No. 11260

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SANNOSUKE MADOKORO,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

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APPELLEE'S BRIEF.

Jurisdiction.

The jurisdictional facts upon which appellant contends the District Court had jurisdiction are adopted by appellee except as follows: This court has jurisdiction under the provision of section 463, subdivision (a) of Title 28, United States Code.

Statutes Involved.

Section 13(a) of the Immigration Act of May 26, 1924 (8 U. S. C. 213(a)):

> "Section 13(a). No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa * * *"

Section 13(b) of the Immigration Act of May 26, 1924 (8 U. S. C. 213(b)):

> "In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa."

The regulations issued pursuant to the foregoing authority are contained in Rule 3, subdivision F, paragraph 1, of the Immigration Rules of July 1, 1925:

> "No immigrant, whether a quota immigrant or nonquota immigrant, of any nationality shall be admitted to the United States unless such immigrant shall present to the proper immigration official, at the port of arrival, an immigration visa duly issued and authenticated by an American consular officer: Provided, That (a) *aliens who have been previously lawfully admitted* to the United States and who are returning from a temporary visit of not more than six months to Canada * * * Mexico * * * or such aliens who are returning from a temporary visit to any other foreign country and who are in possession of a permit to reenter the United States issued in accordance with the provisions of section 10 of the immigration act of 1924, * * * if otherwise admissible, shall be permitted to enter the United States without an immigration visa." (Italics added.)

Section 13(c) of the Immigration Act of May 26, 1924 (8 U. S. C. 213(c)):

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

Section 14 of the Immigration Act of May 26, 1924 (8 U. S. C. 214):

> "Sec. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this act to enter the United States, or to have remained therein for a longer time than permitted under this act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917 * * *"

Section 23 of the Immigration Act of May 26, 1924 (8 U. S. C. 221):

> "Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he

entered the United States lawfully, and the time, place and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Justice."

Rule 13, subdivision 3, of the Immigration Rules of May 1, 1917:

"Subd. 3. Identification of aliens habitually crossing boundary—The card of identification prescribed by subdivision 9 of rule 12 shall be used also upon the Mexican border."

Rule 12, subdivision 9, of the Immigration Rules of May 1, 1917:

"Subd. 9. Identification of aliens habitually crossing boundary—With a view to avoid delays and embarrassment in cases of aliens who, residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress. The applicant for such a card shall be required to furnish two unmounted photographs of himself, of appropriate size, for attachment to the card, and shall supply the data necessary to fill out the card in complete form. To guard against the use of the card by any other person than the one to whom furnished (through its being lost or stolen or otherwise improperly acquired) the official issuing the card shall require the applicant to sign his

name partly on the margin of the photograph and partly on the body of the card itself. The card may be issued also to United States citizens desirous of availing themselves of this means of ready identification. It shall constitute a pass which shall be promptly honored by immigration officials simply upon satisfying themselves that the person presenting it is the person represented by the photograph thereto attached and therefore the rightful holder of the card."

Rule 3, subdivision O, paragraph 1, of Immigration Rules of February 1, 1924:

"Para. 1—With a view to avoid delays and embarrassment in cases of aliens and citizens who, residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress. The applicant for such a card shall be required to furnish two unmounted photographs of himself, of appropriate size, for attachment to the card, and shall supply the data necessary to fill out the card in complete form. To guard against the use of the card by any other person than the one to whom furnished (through its being lost or stolen or otherwise improperly acquired) the official issuing the card shall require the applicant to sign his name partly on the margin of the photograph and partly on the body of the card itself: Provided, that such card may be taken up or canceled at any time within the discretion of the proper immigration official."

Statement of Facts.

The appellant herein is a native and subject of Japan, born on March 7, 1893 [Return Ex. A, p. 2].[1] His wife and four children are domiciled in Japan. He has one son, Sumio Madokoro, residing in the United States [Return, Ex. A, pp. 8, 9].

Appellant first entered the United States at the port of Seattle, Washington, on August 21, 1915, as a member of the crew of the vessel "Tacoma Maru" and deserted the vessel [Return Ex. A, p. 3, and Ex. No. 2 therein]. He has resided in the United States continuously since the date of original entry with the exception of various departures to Mexico at the port of Calexico, California, between the years 1918 and 1926 [Return, Ex. A, pp. 3, 4]. His purpose in departing intermittently to Mexico was to farm in Mexicali, Mexico. He states he applied for the border crossing privilege about January or February, 1918, and was issued an identification card [Return, Ex. A, p. 4]. The records of the Immigration and Naturalization Service at Calexico reveal that appellant was granted a duplicate of Border Permit No. 11588, on August 3 ,1920, and that an application for an alien resident's identification card was filed by the appellant on April 17, 1925, and he was issued a card valid until October 17, 1925. This card was revalidated later for a ten day period beginning October 15, 1926 [Return Ex. A at Ex. 3 therein].

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[1]The reference herein preceded by "[Return, Ex. A]" is to the transcript of deportation hearing attached to the Return to Writ of Habeas Corpus as Exhibit A, which Exhibit, by stipulation, was not printed as a portion of the Transcript of Record, but may be considered in its original form by the Circuit Court of Appeals [R. 70].

Appellant last entered the United States, after an absence of about one-half day in Mexico, at the port of Calexico, California, on December 28, 1926, at which time he was in possesison of an *expired* border crossing identification card [Return Ex. A, p. 6].

Appellant was apprehended as an enemy alien at Guadalupe, Santa Maria County, California, on February 18, 1942, and delivered to the custody of the Immigration and Naturalization Service at Tuna Canyon Detention Station, Tujunga, California [R. 33]. He was transported to Bismarck, North Dakota, on February 22, 1942, arriving there February 26, 1942, and was placed in a detention station known as Fort Lincoln, North Dakota [R. 33].

A warrant directing the arrest of the appellant was issued under the authority of the Attorney General on March 18, 1942, charging that the appellant last entered the United States at Calexico, California on December 28, 1926, and that he was subject to deportation under the Immigration Act of 1924, in that, at the time of his entry, he was not in possession of an unexpired immigration visa, and was an alien ineligible to citizenship [Return, Ex. A, at Ex. 1 therein]. Appellant was accorded a hearing under the aforesaid warrant of arrest, at Fort Lincoln, Bismarck, North Dakota. The hearing was begun on March 23, 1942, and an interpreter in the English and Japanese languages was utilized [Return, Ex. A, p. 1]. At the beginning of the hearing appellant was permitted to inspect the original warrant of arrest, and he acknowledged that he had received a copy of the said warrant [Return, Ex. A, p. 1]. The charges contained in the warrant of arrest were repeated to him verbatim, and he acknowledged that he understood them [Return, Ex. A, p. 1]. He was

also informed that the purpose of the hearing was to show cause why he should not be deported from the United States, and that he had a right to be represented by counsel, either by an attorney, or other person of good moral character, of his own selection, and at his own expense [Return, Ex. A, p. 1]. Appellant asserted that he did not wish to be so represented, and that he was ready and willing to proceed with the hearing [Return, Ex. A, p. 1].

At the conclusion of the deportation hearing, on March 24, 1942, appellant stated that he had thoroughly understood the interpreter [Return, Ex. A, p. 13]. The proposed findings of fact, conclusions of law, and order of the presiding Immigration Inspector were served upon the appellant, and exceptions thereto were entered by the appellant in the form of a letter signed by him and addressed to the Commissioner of Immigration and Naturalization, dated April 8, 1942 [R. 46, 47, 48 and Resp. Ex. A].[2]

Thereafter, on August 18, 1942, upon the basis of the evidence adduced at the hearing, a warrant directing appellant's deportation was issued under the authority of the Attorney General [R. 3, 4, 7]. Appellant was ordered interned as an enemy alien on July 20, 1942, and was interned at Lordsburg, New Mexico. On October 17, 1943, he was paroled to the Gila River War Relocation Project, and he remained there until October 23, 1945, when he was released to proceed to Compton, California [R. 33, 34]. Appellant was taken into custody on December 13, 1945, for deportation, pursuant to the outstanding warrant of deportation issued by the Attorney General [R. 7].

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[2]The reference herein to "Respondent's Ex. A" is to the exhibit which is to be considered by the Circuit Court in its original form [R. 70].

ARGUMENT.

What Constitutes an Entry Within the Meaning of the Immigration Laws.

The evidence shows that the appellant's border crossing identification card had *expired* at the time he last entered the United States at Calexico, California, on December 28, 1926 [Return, Ex. A, p. 6, and Ex. 3 therein]. Therefore, appellant's first question, to wit: "Does a 're-entry' into the United States by a resident alien in possession of a border permit issued to him by the Immigration Service, constiute a 'new entry' into the United States within the meaning of Sections 13 and 14 of the Immigration Act of 1924", should be narrowed to conform with the facts by interpolating the word "expired" to modify the words "border permit". However, the question of what constitutes an "entry" or "new entry" within the meaning of the immigration and naturalization laws, is not dependent upon the validity of the documents in possession of the alien at the time of entry. In this case the alien's departure and re-entry at the port of Calexico on December 28, 1926, with an *expired* border crossing permit is simply persuasive evidence of the fact that he was not lulled into any false sense of security by virtue of the possession of the card, nor did the fact that it had expired dissaude him from departing to Mexico.

What constitutes an "entry" within the meaning of Section 14 of the Immigration Act of 1924 (8 U. S. C. 214) has been answered by the Supreme Court in *United States ex rel. Stapf v. Corsi,* 287, U. S. 129, 53 S. Ct.

40, 77 L. Ed. 215, in the following language at page 132, 287 U. S.:

> "The relator's arrival in the United States in April 1929, was an entry into this country notwithstanding he was a member of the crew of an American ship which had made a round trip voyage. He came from a place outside the United States and from a foreign port or place, within the meaning of the immigration laws. United States *ex rel.* Claussen v. Day, 279 U. S. 398, 49 S. Ct. 354, 73 L. Ed. 758. While that case construed section 19 of the Act of February 5, 1917 (8 U. S. C. 1155), and the time limitation therein contained, the decision as to what constitutes an entry is equally conclusive in construing other sections of the immigration law."

The term "entry" as used in section 19(a) of the Immigration Act of February 5, 1917, was interpreted by the Supreme Court in *United States ex rel. Volpe v. Smith,* 289 U. S. 422, 53 S. Ct. 665; 77 L. Ed. 1298, as follows, at page 425, 289 U. S.:

> "We accept the view that the word 'entry' in the provision of section 19 * * * includes *any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one.*" (Italics added.)

In *Taguchi v. Carr,* 62 F. (2d) 307, decided by this Court, it was held that the alien's return to the United States after spending ten days on foreign soil forced by reason of shipwreck, constituted a coming from a foreign country within the meaning of the immigration laws. And in *Blumen v. Haff,* 78 F. (2d) 833, this Court held that there had been an entry within the meaning of the immi-

gration laws where the aliens involved had been brought to the United States through extradition proceedings from England. In *Ward v. De Barros,* 75 F. (2d) 34, the First Circuit Court of Appeals held there was an arrival from a foreign place within the meaning of the immigration laws, where it was unknown to the alien that the train on which he was riding had passed through Mexico. There has also been an "entry" where an alien was deported to the United States from a foreign country following his extradition from the United States at a time when he was subject to deportation from the United States. (See *United States ex rel. Fitleberg v. McCandless,* 3rd Cir., 47 F. (2d) 683.)

Before taking up the second question stated by appellant, attention will be given briefly to the argument of appellant beginning at page 4 of his opening brief, that deportation is barred by the three year statute of limitations contained in section 34 of the Immigration Act of 1917 (8 U. S. C. 166). At the outset such contention is untenable. The deportation warrant is not based upon any of the deportable grounds found in the provisions of the Immigration Act of 1917 (8 U. S. C. 155). Deportation is directed solely under the provisions of the Immigration Act of July 1, 1924 [R. 4]. Application of the deportation provisions of the Immigration Act of 1924, *supra,* is not restricted by any statute of limitations. Section 14 (8 U. S. C. 214) provides "Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States * * * shall be taken into custody and deported * * *" This section contains no time limitation within which deportation must be instituted if the last

entry occurred after July 1, 1924. (*Ex parte Sturm,* 38 F. (2d) 272.) The fact that appellant originally entered the United States as a deserting seaman prior to July 1, 1924, has no application where deportation is directed under section 14 of the Immigration Act of 1924, *supra.* (*United States ex rel. Stapf v. Corsi, supra.*) See references in Opinion of the District Judge in the instant case [R. 13, 14]. Accordingly, the appellant's contention that the warrant of arrest and the warrant of deportation must be entered within three years, is inapplicable to the case at bar.

Turning now to appellant's contention that a border permit would not have been granted to him had he not acquired the status of a lawful resident alien, it is desired to point out first that appellant's references in his opening brief and appendix B to Part 160, Title 8, Code of Federal Regulations, are irrelevant for the reason that codification of the Rules and Regulations of the agencies of the Federal Government was not authorized until June 30, 1937 (Federal Register Act, 50 Stat. 304, 44 U. S. C. 311) and the first edition of Title 8, Code of Federal Regulations, was printed in 1942. Therefore the regulations promulgated in Part 160, Title 8, Code of Federal Regulations were not in effect when the appellant was issued a border permit in 1920 and again in 1925. The regulations in force on the dates last mentioned relating to border crossing identification cards are quoted in this brief. Those regulations did not specifically require that, as a prerequisite to obtaining a border crossing identification card, an alien must establish a prior lawful admission to the United States. However, the Immigration Act of May 26, 1924, which became effective July 1, 1924 (8 U. S. C.

201, annotation 1), provides that no immigrant shall be admitted to the United States unless he has an unexpired Immigration visa (Section 13(a), 8 U. S. C. 213(a)), and the appellant became subject to the provisions of that statute on any re-entry into the United States from Mexico subsequent to July 1, 1924. The same Act provides that in such classes of cases, and under such conditions as may be by regulations prescribed, immigrants who have been *legally* admitted to the United States and who depart therefrom temporarily, may be admitted to the United States without being required to obtain an immigration visa (section 13(b), 8 U. S. C. 213(b)). The regulations (subdivision F, Rule 3, Immigration Rules July 1, 1925), issued pursuant to the statute have been heretofore set out in this brief and provide exemption from visa requirements only for those immigrant aliens who have been previously lawfully admitted to the United States. Appellant concedes that he entered the United States illegally as a deserting seaman in 1915, and he could not, therefore, subsequent to July 1, 1924, qualify under the exemption relieving him from the necessity of presenting an unexpired immigration visa when entering the United States.

Whatever may have occurred at the port of Calexico when the appellant was issued a border crossing identification card in 1925 is unimportant, because the acts of the officers in permitting his re-entry to this country on the basis of that card could not waive the statutory requirement of the Immigration Act of 1924, *supra,* that an immigrant alien must present an unexpired immigration visa when entering the United States unless he is exempt from such presentation by virtue of a previous lawful admission. The United States is neither bound nor

estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *United States v. City and County of San Francisco,* 310 U. S. 16, 60 S. Ct. 749, 84 L. Ed. 1050, reh. den. 60 S. Ct. 1071, 310 U. S. 657, 84 L. Ed. 1420.

On October 15, 1926, appellant was asked by the immigration officials at Calexico to produce his passport, presumably so that any endorsements thereon as to date and place of original admission to the United States might be checked. He responded that his passport was in possession of his wife in Santa Barbara, California, whereas, as he well knew, he had never had a Japanese passport. [Return, Ex. A, pp. 4, 5.] A short time later, on December 29, 1926, at Calexico he averred falsely to the immigration officials that he had ben admitted to the United States for permanent residence at Seattle, Washington, on January 22, 1909. [Return, Ex. A, p. 5.] These efforts to deceive the officers force the conclusion that the appellant was well aware of his illegal immigration status in the United States and that he hoped to gain an advantage under the immigration laws by his false statements.

It is desired to reiterate that the appellant, when he last departed to Mexico and re-entered the United States on December 28, 1926, was in possession of an *expired* border crossing identification card. His testimony on this point is here quoted [Return, Ex. A p. 6]:

> "Q. Had your border permit at Calexico, Calif., expired at the time of your last entry into the United States at that port on December 28, 1926? A. *My permit was expired long before that* and I was on that date living in Guadalupe, Calif. I had some

business to complete in Mexico and I came down to take care of it that day." (Italics added.)

Accordingly, appellant's statement in his opening brief (p. 7) that this Honorable Court is being asked to pass upon an issue of first impression, to wit: whether the general rules laid down by the Courts as to the date of entry governing in deportation proceedings and lack of a limitation of time under the Immigration Act of 1924, *supra*, are equally applicable to an alien who enters the United States with a border permit, is a misleading statement. The facts are clear that the appellant held an *expired* border permit at the time of his last entry, and it is elementary that he could gain no advantage through the possession of an invalid document.

Appellant urges finally that a person who is in possession of a border crossing identification card and makes frequent crossings into foreign, contiguous, territory, has not made an "entry" within the meaning of the immigration laws. This contention is amply answered by the authorities hereinabove quoted on the question of what constitutes an "entry." This Honorable Court in the case of *Ali v. Haff,* 114 F. (2d) 369, made the following statement:

> "Regardless of the date of original entry, however, the governing date is that of the alien's last entry into the United States no matter for what purpose the alien may have left the country and returned. Suwa v. Carr, 9 Cir., 88 F. 2d 119. It follows, therefore, if the alien was actually in Mexico in September 1928, or at any time subsequently to July 1, 1924, regardless of purpose or length of visit, the date of his original entry into the United States prior to that time is unimportant. Thaman Singh v. Haff, 9 Cir., 83 F. 2d 679."

Opportunity to Secure Counsel.

The appellant does not contend that he was not advised of his right to counsel at the deportation hearing, nor deny that he stated he did not wish to be represented. [Return, Ex. A p. 1 and R. 37.] It is urged instead that the circumstances were such that he had no opportunity to secure counsel even if he had desired to do so. This argument is analogous to that made in the case of *Kishan Singh v. Carr,* 9th Cir., 88 F. (2d) 672, wherein it was contended that the hearing was unfair because the alien, although offered the opportunity to cross-examine certain witnesses for the government, declined to do so because he was financially unable to take advantage of such opportunity. The same argument might be made in any case in which an alien, because of financial circumstances, was not disposed to employ counsel and waived representation. If we adopt appellant's view, an undesirable alien who waived representation at his hearing, could compel endless delays in the attempt of the Government to expel him from its shores.

Appellant's deportation hearing was conducted at a detention facility operated by the Immigration and Naturalization Service, located at Fort Lincoln, four miles from the city of Bismarck, the capital of North Dakota. The population of the city of Bismarck, acording to the 1940 official census of the U. S. Bureau of Census was 15,496, and doubtless there were attorneys there available to appellant within his financial means. [R. 48, 49, 50.] Had the appellant expressed a desire to be represented by counsel, he would have been afforded ample time within which to contact any attorney of his choosing or other person of good character. The deportation hearing clearly reflects that the appellant was advised of his right to be

represented by an attorney or other person of good moral character; that he replied in the negative when asked if he wished to be represented; and that he asserted his willingness to proceed with the hearing. [Return, Ex. A, p. 1.] At the conclusion of the hearing, appellant was asked whether he had any further statements to make or questions to ask, and he responded in the negative. [Return, Ex. A p. 13.] He acknowledged that he had thoroughly understood the interpreter during the hearing. [Return, Ex. A p. 13.] Appellant filed written exceptions [Resp. Ex. A, see footnote 2, *supra*], to the findings, conclusions, and order of the presiding inspector, and did not complain then of a violation of his rights or a lack of "opportunity" to secure the services of counsel. In fact, it can be said that appellant had counsel at this stage of the proceedings, because the exceptions, so he testifies, were written for him by a fellow detainee, a Mr. Fuji. [R. 47.] The exceptions are intelligently and ably prepared and contain a strong sympathetic plea. Moreover, and of great importance, *the facts of this case are not in controversy.*

A proceeding to deport an alien who was advised that he was entitled to be represented by counsel but refused to engage counsel was not unfair.

U. S. ex rel. Di Constanzo v. Uhl, 6 F. Supp. 791;

U. S. ex rel. Medich v. Burmaster, 8th Cir., 24 F. (2d) 57.

The holding of a deportation hearing in a prison or other place of confinement does not constitute an unfair hearing.

Rousseau v. Weedin, 9th Cir., 284 Fed. 565, at page 566 states:

> "The appellant contends that he was deprived of a fair hearing, in that he was confined in the state penitentiary at the time thereof. We can find in that fact no implication that the hearing was unfair. It is true that the appellant was not represented by an attorney, but was advised of his right to counsel, and repeatedly was asked if he desired an attorney, and always answered in the negative."

U. S. ex rel. Wlodinger v. Reimer, 2d Cir., 103 F. (2d) 435, at page 436, states:

> "On the issue of fair hearing the appellant complains that he was examined by the immigrant inspectors while in prison and without counsel. * * * The fact that the hearing was held in prison did not render it unfair. The appellant was given the chance to have counsel present."

U. S. ex rel. Bilokumsky v. Tod, 44 S. Ct. 54, 57, 263 U. S. 149, 157, 68 L. Ed. 221, at page 57 (263 U. S. 149, 156, 157):

> "The argument is that if a judgment of deportation is to rest upon admissions attributable to the person to be deported, the admissions must have been made by him as a free agent and under circumstances which raise no doubt whether they were in fact made. Deportation is a process of such serious moment that on all controverted matters the executive officers should consider the evidence with close scrutiny. But here there was no denial of alienage; and a landing certificate was introduced by the Government which, when connected with the statement in Bilokumsky's examination, tended in some respects to corroborate

it. Moreover, the statement that one is an alien is not the confession of a crime. Except in case of Chinese, or other Asiatics, alienage is a condition, not a cause, of deportation. So far as appears, there was nothing in the circumstances under which Bilokumsky was examined which would have rendered his answer inadmissible even in a criminal case. *The mere fact that it was given while he was in confinement would not make it so.*" (Italics added.)

Conclusion.

Under the law and the decisions it is manifest that the appellant made an "entry" into the United States at the port of Calexico, California, on December 28, 1926, within the meaning of the immigration laws. The fundamental principles that inhere in due process of law were observed during the hearing afforded appellant to show cause why he should not be deported, and the Attorney General has found that the evidence sustains the charges in the warrant of arrest and has ordered his deportation. The decision of the Court below is correct and should be affirmed.

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